Judge Marc L. Barreca
Hearing Location: Room 7106
700 Stewart St., Seattle, WA 98101
Hearing date: September 13, 2013
Hearing time: 9:30 a.m.

UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE: ADAM GROSSMAN, Debtor.	CHAPTER 7 CASE NO. 10-19817 TRUSTEE'S REPLY TO RESPONSE OF LYMAN C. OPIE TO TRUSTEE'S OBJECTION TO CLAIM NO. 16-1

COMES NOW Ronald G. Brown, the trustee in the above entitled case, through his undersigned attorney, and submits this reply to the Response of Lyman C. Opie to Trustee's Objection to Claim No. 16-1 (the, "Response"). The Response is accompanied by a declaration of Lyman C. Opie which is hereinafter called, the "Opie Declaration".

Introduction

Contrary to what is averred in the Response, the nature and purported benefit of the transactions between the Debtor and Mr. Opie, a friend and insider of the Debtor, that are the subject of Claim No. 16-1 are highly disputed. As set forth in more detail below, the Trustee does not believe that the evidence supports allowance of Mr. Opie's claim.

In the Response, Mr. Opie requests the allowance of all of the amounts asserted in his Claim No. 16-1 except for the amount identified therein for attorneys' fees and costs totaling $14,042.64. Given the omission of this amount in the Response, the Trustee understands that Mr. Opie no longer asserts a claim in regard thereto.[1] Accordingly, the Trustee's objection to the attorneys' fees/costs portion of the

[1] To the extent, if any, Mr. Opie may still assert a claim for attorneys' fees/costs, the Trustee maintains his objection thereto since, among other things, Mr. Opie has not substantiated an entitlement to them under applicable law.

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claim must be sustained and that amount of the claims disallowed. This reply, accordingly, addresses the balance of Claim No. 16-1 and the Trustee's objection thereto.

Summary of Issues

The Response raises the following issues:

1. Whether Mr. Opie's claim for $185,000 plus interest, which is based upon unauthenticated missing alleged promissory notes that, as least in part, were not contemporaneous with alleged pre-bankruptcy payments that were made to Terrington Davies Capital, LLC and not the Debtor, is allowable as a general unsecured claim with at least $135,000 of said claim characterized as marital community obligation?

2. Whether $20,000 Mr. Opie paid post-bankruptcy to the Tsai Law Firm ("Tsai") as an alleged loan to the Debtor-in-Possession ("DIP") without Court order before authority was granted for the DIP to employ Tsai as special counsel constitutes a valid allowable Chapter 11 cost of administration?

Relevant Factual Background

The Response does not contain a cogent complete statement of the relevant pre- and post-bankruptcy background facts which is necessary to understand and follow the issues presented in this matter. The key relevant facts are summarized in this section of the Trustee's reply in chronological order and are based upon Claim No. 16-1, the Opie Declaration and the Court docket.

1. A bank check dated October 8, 2009 for $15,000 was issued allegedly for Mr. Opie to the sole payee, Terrington Davies Capital LLC ("TDC").

2. Mr. Opie originated a wire transfer for $35,000 to TDC on November 13, 2009.

3. After the above transfers, a promissory note *allegedly* dated December 31, 2009 signed only by the Debtor *allegedly* came into existence which provided in relevant part as follows: "For value

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received (i.e., $15,000 on October 8, 2009, and $35,000 on November ___, 2009, Borrower promises to pay Lender $55,668.27 as specified below."[sic].

4. The Debtor and his now ex-spouse, Jill Borodin, were separated and in divorce proceedings in King County Superior Court (09-3-02955-9SEA) commenced in April 2009.

5. On May 25, 2010, Mr. Opie originated a wire transfer to TDC for $135,000.

6. After the transfer for $135,000, a promissory note *allegedly* dated May 25, 2010 signed only by the Debtor *allegedly* came into existence.

7. The Debtor filed Chapter 11, commencing the present case, on August 19, 2010. Notice of the bankruptcy was sent to creditors including Mr. Opie on August 27, 2010. Clerks' Proof of Service [ECF Docket No. 15].

8. An electronic personal check dated October 13, 2010 for $20,000 from Mr. Opie was issued to Tsai as sole payee.

9. The Bankruptcy Court (the Hon. Samuel J. Steiner presiding) entered an order on November 12, 2010 authorizing the Debtor to employ and retain Tsai as his attorneys in the dissolution proceedings. ECF Docket No. 62.[2]

10. The decree dissolving the Debtor's marriage was entered on December 14, 2010. [See Exhibit 1 attached to a declaration of the Trustee's attorney, Docket No. 343.]

11. On December 20, 2010, the Debtor recorded a deed of trust for $300,000 *dated May 25, 2010* (the, "DOT") in favor of Mr. Opie on the Redding, California real property known as the "Glennview Property".

12. On or about December 22, 2010 Ronald G. Brown was appointed as the Chapter 11 Trustee and the Debtor ceased serving as the Debtor-in-Possession.

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[2] The title of the order is "Order Authorizing Employment of Debtor's Family Law Attorney as Special Counsel Nunc Pro Tunc". The "order" language on page 2 of the order does not provide for employment on a nunc pro tunc basis.

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13. The case was converted to Chapter 7 on March 11, 2011 and Mr. Brown was appointed as trustee.

14. On June 13, 2011, the Bankruptcy Court entered an order [ECF Docket No. 196] "provisionally" approving fees and costs to Tsai totaling approximately $62,000 subject to a further hearing and directing that Tsai shall not disburse the sum of $29,500 (attributable to funds from Dennis Vidach and Susan Myers) from its trust account. The further hearing occurred on September 9, 2011 and as a result thereof, the Court entered an order on September 15, 2011 whereunder it denied Tsai's request to apply the aforementioned trust funds to its fees/costs and directing that those funds be turned over to the Trustee. Those funds were subsequently turned over and are on deposit in the Estate's trust account.

15. On January 24, 2012, the Bankruptcy Court entered an order in the Trustee's adversary proceeding for avoidance of transfers (Adv. Pro# 11-01954) approving a stipulation between the Trustee and Mr. Opie avoiding the DOT. Adv. Pro. ECF Docket No. 24.

16. On February 1, 2012, the Trustee filed a motion [ECF Docket No. 307] seeking to enforce Tsai's compliance with the Court's prior orders regarding its fees/costs and to compel turn over of $27,500 that Tsai paid itself from its trust account in violation of those orders. As set forth in the Trustee's February 1st motion, Tsai received the above identified sum via direct payments from the Debtor's friends, Peter Hendrickson on September 16, 2010 for $7,500 and Mr. Opie on October 11, 2010 for $20,000.[3]

17. In partial response to the Trustee's February 1st motion, Tsai filed another application in which it sought to renew its requested disbursement for its provisionally approved fees/expenses. ECF Docket No. 313 . The Trustee objected to that application [ECF Docket No. 324] because, among other

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[3]This information, as stated in the Trustee's February 1st motion, was verified by Tsai itself in the declaration of Emily Tsai filed with the Court on November 4, 2010 [ECF Docket No. 43].

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things, any finally allowed fees/expenses of Tsai would constitute Chapter 11 administration costs of administration, payment, if any, of which would be made at the time of final distribution of the Estate; and, in any event, Mr. Opie had asserted a competing Chapter 11 administrative claim for $20,000 in regard to the same funds that Tsai alleged it should be allowed to retain and pay itself. On March 5, 2012, the Court entered an order [ECF Docket No. 331] in which it denied without prejudice both Tsai's request for disbursement of approved fees and the Trustee's motion for compliance and turnover of the $27,500 in funds held by Tsai attributable to payments to it from Messrs. Hendrickson and Opie. In the foregoing order in the last sentence thereof on page 2, the Court ruled : "The Court may revisit this issue as part of a motion to approve or reject the Lyman Opie claim (Claim No. 16)."

18. No other action regarding either the claims of Tsai or Opie has occurred since entry of the March 5th order.

Analysis and Argument

A. The General Unsecured Portion of Mr. Opie's Claim is Not Allowable and Cannot Be Characterized as Community Obligation.

As a threshold matter all of the transfers that are the basis of Mr. Opie's general unsecured claim were made to TDC and not to the Debtor. Mr. Opie has not explained why and how purported transfers to the Debtor were in fact paid to a third party (i.e., TDC). He has also not explained why and how it was determined that the Debtor would sign promissory notes for funds paid to TDC. Moreover, Mr. Opie has failed to present any evidence showing that the payments to TDC were not intended as investments versus loans to TDC. There is nothing in the record beyond the purported promissory notes supporting any personal liability of the Debtor for the transfers to TDC. Given the absence of credible evidence substantiating the foregoing, there is no basis for allowing Mr. Opie any general unsecured claim.

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In the Opie Declaration, Mr. Opie admits that he does not have custody or possession of any of the alleged originals of the promissory notes, at least one of which was dated after the first two transfers to TDC had already been made. Given the absence of originals of the notes, they cannot be examined for authenticity. Mr. Opie cannot show that they existed as of the dates appearing on the copies thereof and/or that they were not created after the fact to attempt to give the appearance that the Debtor was personally obligated in regard thereto. The Trustee believes that the unsecured portion of the claims are not personal obligations of the Debtor and thus cannot be allowed as claims against the Estate.

In any event, the unsecured portion of the claims cannot be characterized as community obligations. The bulk of the transfers were made to TDC after the Debtor and his ex-spouse were separated and in the process of getting divorced. The transfers were not made to benefit the marital community which, at the time, was being dissolved. The attempt of the Debtor to secure the funds against the Glennview Property with a deed of trust signed only by the Debtor was made after the entry of the divorce decree. This transaction on its face was not a marital community transaction and Mr. Opie cannot now claim otherwise.

Mr. Opie tries to argue in the Response without substantiation that his $135,000 transfer was used to purchase the Glennview Property. Mr. Opie has not produced any evidence showing that the funds used to purchase the Property are traceable in whole or part to Mr. Opie's payment to TDC. The deed of trust which was avoided by stipulation was for a principal sum of $300,000 and not the sum in question. Therefore, there is not basis for characterizing Mr. Opie's claim as an obligation of the marital community.

B. The $20,000 Payment to Tsai Was Not a Reasonable and Necessary Expense for the Benefit of the Estate

Bankruptcy Code §503 provides for the allowance of a claim as costs of administration where it is shown that it is an actual necessary and reasonable cost for preserving the estate. For allowance of an

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expense as an administrative claim, a party asserting the claim has the burden of proof. *In re Dak Industries, Inc.*, 66 F.3d 1091, 1094 (9th Cir. 1995). To qualify as an administrative claim, an expense must arise out of a transaction between the creditor and the debtor-in-possession and be of substantial benefit to the bankruptcy estate. *Id.*; and *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1133 (10th Cir.1993).

Mr. Opie has not satisfied his burden of proof and is not entitled to allowance of a Chapter 11 administrative claim. Mr. Opie and the Debtor were both aware of the bankruptcy and neither of them applied to the Court for authority for borrowing funds outside of the ordinary course of the Debtor's affairs. Mr. Opie acted as a volunteer in advancing the funds to Tsai which were primarily for the benefit of the Debtor personally and not the Estate. Any benefit to Estate was incidental and not intended since, among other things, the fees which Tsai incurred were in substantial part dedicated to litigating issues of child and spousal support that were of no actual or potential benefit to the Estate.[4] In any event, potential benefit to a bankruptcy estate does not satisfy the requirement of §503. *In re Mid Region Petroleum, Inc., supra.* Thus, Mr. Opie does not have an allowable valid administrative claim.

The cases which Mr. Opie relies upon to support his position are readily distinguishable from the facts in the case at bar and thus inapplicable. In each of them, there were relatively simple facts where the administrative claimant paid money directly to the bankruptcy estate and not to a third party and where it was overwhelming clear that money paid was substantially beneficial to the estate. *In re Pizza of Hawaii, Inc.*, 69 B.R. 60,61 (Bankr.HI 1986), centered upon a $100,000 loan from Round Table Pizza to a franchisee to continue post-bankruptcy operations. The transaction which was the basis for the alleged administrative claim was between the administrative claimant and the DIP where it was

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[4] The dissolution proceedings entailed claims against the Debtor for domestic violence. The dissolution decree (see page 8) maintains a continuing restraining order against the debtor. This is emblematic of the fact that any advances from Opie to Tsai were primarily for the personal benefit of the Debtor and not for the benefit of the bankruptcy estate.

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evident that it was an actual and necessary expense to maintain the DIP's business. Such facts are not presented in regard to Mr. Opie.

The facts *In re Photo Promotion Associates, Inc.*, 87 B.R. 835 (Bankr.S.D.N.Y. 1988)["Photo Promotion"] bear no resemblance to the facts in the present case. In Photo Promotion, the administrative claimant, "Colorchrome", developed and processed approximately 34,000 post-bankruptcy orders of the DIP. Photo Promotion at 841. The Court denied Colorchrome's requested super-priority claim but indicated it would allow it a Chapter 11 administrative claim limited to its proven unpaid costs for processing and shipping goods to the DIP. *Id.* Mr. Opie did not advance funds to the DIP and cannot show the obvious and clear benefit to the estate that existed in Photo Promotion.

In re Gloria Manufacturing Corp., 65 B.R. 341, 348 (E.D.VA. 1985)["Gloria Mfg"] involved highly unique circumstances that are in no way directly or indirectly existent on the facts of the case at bar. A Chapter 11 trustee was appointed to oversee the debtor's business operations. Gloria Mfg, supra. The Chapter 11 Trustee personally made an emergency cash advance of over $46,000 to fund the debtor's payroll. *Id.* at 342. The Chapter 11 Trustee was repaid $10,000 of his advance but the case was converted to Chapter 7 before he could be repaid in full or apply for allowance of a super-priority claim. *Id.* The Chapter 11 Trustee applied for allowance of super priority claim pursuant to §364 which in effect was granted. *Id.* at 343. Due to various technical procedural disputed issues, the validity of the super-priority claim was challenged on appeal primarily on the basis that super priority status was not requested before the Trustee's advance. *Id.* at 346. The appellate Court rejected the challenge and affirmed the lower Court after finding that there were sufficient equities that made advance hearing unnecessary. *Id.* at 347. There is no valid comparison between the facts of Gloria Mfg and the present matter. Mr. Opie unlike the Chapter 11 Trustee did not advance any funds directly to the estate, was not faced with any exigencies that would warrant his bypassing advance Court approval and, in any event,

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cannot show the over arching benefit that was obviously involved with for the estate in Gloria Mfg. Therefore, Mr. Opie has failed to prove that he has an allowable Chapter 11 administrative claim and the claim must be disallowed.

Mr. Opie Cannot Subrogate His Claim to the Priority Classification of Tsai's Claim

In the Response, in effect, Mr. Opie asserts that his claim is entitled to the identical classification as that of Tsai (i.e., Chapter 11 administrative expense). There is no basis in fact or law for Mr. Opie to receive such treatment. A third party volunteer who pays money allegedly related to or for a post-petition claim does not inherit the priority classification of that claim. The Bankruptcy Code has specific provisions governing when a party may subrogate to the rights of a holder of a claim contained in §507(d). Mr. Opie's claim does not fall within the terms and conditions of Section 507(d) which in general expressly provides that the party claiming subrogation does not attain the right of the holder of such claim to the holder's priority classification. Therefore, Mr. Opie does not have a right to the same classification as Tsai's claim.

In any event, it should be noted that administrative payment of Tsai including the $20,000 sum of Mr. Opie is a matter of an unresolved dispute between the Estate and Tsai. Mr. Opie and Tsai, under any circumstances, cannot both have an allowable administrative claim for $20,000 since, among other things, it would result in the Estate potentially paying the same claim twice.

Conclusion

There is no valid basis for allowing Mr. Opie an administrative claim and, therefore, the claim must be disallowed. Therefore, Claim No. 16-1 of Mr. Opie should be disallowed.

DATED this 10th day of September, 2013

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/s/ Bruce P. Kriegman
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PROOF OF SERVICE

I hereby certify that on September 10, 2013 I caused a true and correct copy of the foregoing to be served upon Hugh McCullough, Esq., attorney for Lyman C. Opie at his ECF registered e-mail address via ECF.

DATED this 10th day of September, 2013

/s/ Bruce P. Kriegman
Bruce P. Kriegman

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